

Procurement Guidance - (1/2014)

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T3.2.5 - Contractor Ethical Guidelines Revised 4/2008

A Contractor Ethical Guidelines

1 Officials Not to Benefit

FAA contracts are to state that no member of or delegate to Congress, or resident commissioner, will be admitted to any share or part of the contract or any benefit arising from it. If a contract is made between the FAA and any member of or delegate to Congress, or resident commissioner, it may constitute a violation of 18 U.S.C. 431 and 432, resulting in:

- a. Both the employee of the FAA who awarded the contract and the member, delegate, or resident commissioner being subject to criminal penalties;
- b. The contract being void; and
- c. The contractor having to return any consideration paid by the FAA under the contract.

2 Contractor's Gratuities to FAA Personnel Revised 4/2008

a. With certain limited exceptions, employees are prohibited from accepting gratuities or gifts from contractors or persons seeking FAA contracts or other business under rules prescribed in 5 CFR 2635.201-2635.205. This applies to all contracts except those for personal services.

b. Information or allegations concerning unlawful gratuities or gifts should be promptly referred to the Inspector General. If the Inspector General finds evidence that an offeror or contractor offered or gave an unlawful gratuity or gift, the Contracting Officer (CO) must determine whether debarment proceedings are appropriate in addition to actions taken under a specific contract

c. Before taking any action against a contractor, the CO should determine, after notice and hearing by the FAA Office of Dispute Resolution for Acquisition, whether the contractor, its agent, or another representative, under a contract containing the "Gratuities or Gifts" clause:

(1) Offered or gave a gratuity (e.g., an entertainment or gift) to an officer, official, or employee of the FAA; and intended by the gratuity to obtain a contract or favorable treatment under a contract (intent generally must be inferred).

(2) The contractor will have an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents.

(3) When the CO determines that a violation has occurred, FAA may terminate the contractor's right to proceed and initiate debarment or suspension measures.

3 Contingent Fees Revised 4/2008

a. A contractor may not pay a fee to an agent contingent upon the agent's soliciting or obtaining award of a contract. Such a fee arrangement is improper because it may lead to attempted or actual exercise of improper influence. The prohibition does not apply to contingent fee arrangements between contractors and bona fide employees or bona fide agencies employed by contractors to secure business. Contractors should warrant that they have not engaged in contingent fee arrangements, other than those with full-time bona fide employees working solely for the prospective contractor, when they sign the contract.

b. For breach or violation of the warranty by the contractor, FAA may annul the contract without liability or deduct from the contract price or consideration, or otherwise recover, the full amount of the contingent fee.

(1) FAA employees who suspect or have evidence of attempted or actual exercise of improper influence, misrepresentation of a contingent fee arrangement, or other violation of the contingent fee clause should report the matter promptly to the Contracting Officer (CO) or the Inspector General.

(2) When there is specific evidence or other reasonable basis to suspect one or more of the violations in paragraph (1) above, the CO should review the facts and, if appropriate, take or direct one or more of the following, or other, actions:

- (a) If before award, reject the offer;
- (b) If after award, enforce FAA's right to annul the contract or to recover the fee;
- (c) Initiate suspension or debarment action;
- (d) Refer suspected fraudulent or criminal matters to the Department of Justice.

4 Limitation on the Payment of Funds to Influence Federal Transactions Revised 4/2008

a. A recipient of a Federal contract, grant, loan, or cooperative agreement is prohibited by 31 U.S.C. 1351 from using appropriated funds to pay any person for influencing or attempting to influence an officer or employee of any agency, member of Congress, officer or employee of Congress, or employee of a member of Congress in connection with award of any Federal contract, grant, loan, cooperating agreement, or modification to any of the aforementioned.

b. By signing its offer, an offeror certifies that no appropriated funds have been paid or will be paid in violation of 31 U.S.C. 1352.

c. Suspected violations of will be referred to the Contracting Officer. The FAA may impose and collect civil penalties pursuant to the provisions of the Program Fraud and Civil Remedies Act, 31 U.S.C. 3803 (except subsection (c)), 3804-3408, and 3812.

5 Subcontractor Kickbacks

As prescribed by the Anti-Kickback Act (41 U.S.C. 51-58), subcontractors are prohibited from making payments (or anything of value) and contractors from accepting payments (or anything of value) for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or a subcontract relating to a prime contract.

6 Unreasonable Restrictions on Subcontractor Sales Revised 4/2008

Subcontractors are not to be unreasonably precluded from making direct sales to FAA of any supplies or services made or furnished under a contract. However, this does not preclude contractors from asserting rights that are otherwise authorized by law or regulation.

7 Contracts with Federal Employees/Business Owned by Federal Employees

a. *Contracts with Current Federal Employees.* The FAA will not knowingly award a contract to a Federal employee or to a business concern or other organization owned or substantially owned or controlled by one or more Federal employees.

b. *Contracts with Former Federal Employees.* The FAA may enter into contracts with a former Federal employee, or business concern or other organization owned or substantially owned or controlled by one or more former Federal employees.

c. *Contracts with Former Federal Employees Taking the Retirement Buy-out.* The FAA may enter into contracts with former Federal employees who have taken the buy-out retirement option only if those individuals have complied with federal, agency, and local laws or policies concerning reemployment as a contractor. The Contracting Officer should consult with the cognizant legal counsel about retirement buy-out restrictions and potential contracts with former Federal employees.

8 Voiding and Rescinding Contracts Revised 4/2008

a. The FAA has discretionary authority to void and rescind contracts, in addition to any other rights available under law or regulation, when a contractor has a final conviction for bribery, conflict of interest, misconduct, or any other violation of 18 U.S.C. 201-224 involving or relating to FAA contracts. The FAA may also recover the amounts expended and property transferred under the contracts.

b. Because a final conviction under 18 U.S.C. 201-224 relating to a contract also may justify the conclusion that the party involved is not presently responsible, the Contracting Officer (CO) should consider initiating debarment proceedings, if debarment has not been initiated, or is not in effect at the time the final conviction is entered.

c. The facts concerning any final conviction for any violation of 18 U.S.C. 201-224 involving or relating to FAA contracts should be reported promptly to the CO. The CO should also promptly notify the Civil Division, Department of Justice, that action is being considered.

d. When proposing to declare void and to rescind a contract, the CO will provide to the contractor, as a minimum, the following:

(1) A written notice of proposed action to declare void and rescind the contract sent by certified mail, return receipt requested. The notice should:

(a) Advise that consideration is being given to declaring void and rescinding contracts awarded by FAA, and recovering the amounts expended and property transferred, under the provisions of 18 U.S.C 218;

(b) Specifically identify the contracts affected by the action;

(c) Specifically identify the final conviction on which the action is based;

(d) State the amounts expended and property transferred under each of the contracts involved, and the money and the property demanded to be returned;

(e) Identify any tangible benefits received and retained by the FAA under the contract, and the value of those benefits, as calculated by the FAA;

(f) Advise that pertinent information may be submitted within 30 calendar days after receipt of the notice, and that, if requested within that time, a hearing will be held at which witnesses may be presented and any witness the FAA presents may be confronted. Also, advise that no inquiry will be made regarding the validity of the conviction.

(g) Advise that action will be taken only after the CO issues a final written decision on the proposed action.

(2) The final decision to void and rescind a contract will be based on the information available to the Contracting Officer, including any pertinent information submitted or, if a hearing was held, presented at the hearing. If the Contracting Officer declares void and rescinds the contract, the final decision will:

(a) State that determination;

(b) Reflect consideration of the fair value of any tangible benefits received and retained by the FAA;

- (c) State the amount due and the property to be returned to the FAA; and
- (d) Be sent promptly by certified mail, return receipt requested.

9 Whistleblower Protection for Contractor Employees Revised 10/2010

a. FAA contractors should not discharge, demote or otherwise discriminate against an employee as a reprisal for disclosing information to a Member of Congress, or an authorized official of an agency or of the Department of Justice, relating to a substantial violation of law related to a contract (including the competition for or negotiation of a contract).

b. Any employee of a contractor who believes that he or she has been discharged, demoted, or otherwise discriminated against may file a complaint with the Inspector General. Upon completion of the investigation, the Contracting Officer (CO) will ensure that the Inspector General's report of findings is provided to:

- (1) The complainant and any person acting on the complainant's behalf;
- (2) The contractor alleged to have committed the violation; and
- (3) The Director of Acquisition and Contracting.

c. The complainant and the contractor will be afforded the opportunity to submit a written response to the report of findings within 30 days to the contracting officer. Extensions of time to file a written response may be granted by the contracting officer. At any time, the CO may request additional investigative work be done on the complaint.

d. If the CO determines that a contractor has subjected one of its employees to a reprisal for providing information to a Member of Congress, or an authorized official of an agency or of the Department of Justice, the CO may take one or more of the following actions:

- (1) Order the contractor to take affirmative action to abate the reprisal;
- (2) Order the contractor to reinstate the person to the position that the person held before the reprisal, together with the compensation (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken; or
- (3) Order the contractor to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal.

e. Whenever a contractor fails to comply with an order, the CO should request the Department of Justice to file an action for enforcement of such order in the United States district court for a

district in which the reprisal was found to have occurred. In any action brought under this section, the court may grant appropriate relief, including injunctive relief and compensatory and exemplary damages.

f. Any person adversely affected or aggrieved by an order issued under this section may obtain review of the order's conformance with the law in the United States Court of Appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the CO. Review is to conform to 5 U.S.C. 7.

10 Contractor Code of Business Ethics and Conduct Added 4/2008

FAA contractors must conduct themselves with the highest degree of integrity and honesty. Contractors should have a written code of business ethics and conduct. To promote compliance with such code of business ethics and conduct, contractors should have an employee business ethics and compliance training program and an internal control system that:

- a. Are suitable to the size of the company and to the extent of its involvement in Government contracting;
- b. Facilitate timely discovery and disclosure of improper conduct in connection with FAA contracts; and
- c. Ensure corrective measures are promptly instituted and carried out.

11 Definitions Revised 4/2008

- a. *"Bona fide agency,"* means an established commercial or selling agency, maintained by a contractor for the purpose of securing business, that neither exerts nor proposes to exert improper influence to solicit or obtain FAA contracts nor holds itself out as being able to obtain any FAA contract or contracts through improper influence.
- b. *"Bona fide employee,"* means a person, employed by a contractor and subject to the contractor's supervision and control as to time, place, and manner of performance, who neither exerts nor proposes to exert improper influence to solicit or obtain FAA contracts nor holds out as being able to obtain any FAA contract or contracts through improper influence.
- c. *"Contingent fee,"* means any commission, percentage, brokerage, or other fee that is contingent upon the success that a person or concern has in securing a FAA contract.
- d. *"Improper influence,"* means any influence that induces or tends to induce an employee to give consideration or to act regarding an FAA contract on any basis other than the merits of the matter.

e. *"Authorized official of the agency"* means an employee responsible for contracting, program management, audit, inspection, investigation, or enforcement of any law or regulation relating to FAA procurement or the subject matter of the contract.

f. *"Authorized official of the Department of Justice"* means any person responsible for the investigation, enforcement, or prosecution of any law or regulation.

g. *"Final conviction"* means a conviction, whether entered on a verdict or plea, including a plea of nolo contendere, for which a sentence has been imposed.

B Clauses

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C Forms

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